Neutral Citation Number: [2021] EWHC 2090 (Admin)

Case No: CO/2453/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
23rd July 2021

Before :
MR JUSTICE FORDHAM

- -

Between :

THE QUEEN
(On the application of Mathew Richards) — **Claimant**
- and -
THE ENVIRONMENT AGENCY — **Defendant**
-and-
WALLEYS QUARRY LIMITED — **Interested Party**

- -
- -

Ian Wise QC (instructed by RMB Solicitors) for the **Claimant**
Jacqueline Lean (instructed by Environment Agency) for the **Defendant**
The **Interested Party** did not appear and was not represented

----

Hearing date: 23.7.21

Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a claim for judicial review which is still at the permission stage, and in relation to which the usual deadline for filing and serving of acknowledgements of service by the Defendant and Interested Party has not yet been reached. The central issue in the claim, as it provisionally seems to me from the papers, is this. Is the Defendant required, by virtue of the Human Rights Act 1998 or alternatively common law principles, to take positive action in the context of hydrogen sulphide emissions from a landfill and a 5 year old boy with severe acute respiratory problems (the Claimant). The time to say more about the nature of the case will be the time at which issues are substantively addressed.

Urgent consideration

2. The case came before me as the 'Immediates Judge' on 16 July 2021. The Immediates Judge has a lot of papers to deal with at high speed because it is they who are 'on call' to deal with urgent applications. For obvious reasons, it is not always possible for the Immediates Judge to get very far into reading bundles of materials. The reason why the papers came so urgently was because the Claimant's team had requested, by use of a Form N463, that within 24 hours a High Court judge should consider the papers and direct an oral hearing of an application for interim relief (together with permission for judicial review and permission to rely on the expert evidence in the bundle from Dr Sinha), the directions urgently sought being that that interim relief hearing should take place by 30 July 2021, with a time estimate of one day, and with the Court giving 5 days for the Defendant and Interested Party to respond to interim relief and permission. What I did was to direct an urgent directions hearing, to take place by MS Teams today. I made provision for all parties to respond to some observations which I had made, by filing letters. I am very glad I took that course. The Claimant and Defendant have both responded, with carefully considered and helpful letters setting out their positions.

A rolled-up hearing

3. I had floated in my observations the idea that a 'rolled-up hearing' – dealing with the substantive issues on an expedited timetable – might be far better in this case than an oral hearing of interim relief. A hearing of interim relief would itself require a full day's hearing. It would necessarily have had to address 'satellite questions' regarding the balance of convenience and justice. As it seemed to me, any Judge dealing with interim relief at that (one-day) hearing – especially in circumstances where what was being sought was a mandatory order to require the Defendant to take steps pursuant to its statutory powers, to suspend activities at the Interested Party's landfill site – would need to and want to have a good appreciation of the legal issues and be able to form an informed, albeit provisional, view of the strength of the claim. In the event, both the Claimant and the Defendant have supported an expedited rolled-up hearing.

Timetabling

4. At today's hearing we have been able to thrash out the implications, for each party, of different possible timetables. It is not necessary for me to describe the positions which the Claimant and Defendant adopted as to dates and timetables, including their fall-

back positions. I was able, with both Counsel's assistance, to identify what I am quite satisfied is a timetable striking an appropriate and fair balance to allow judicial review proceedings to culminate in this case in a rolled-up hearing, at which the issues can be fairly and properly ventilated, promoting the interests of justice and having regard to the overriding objective. One of the features of this case is that the Defendant has been able to identify anticipated steps which would necessarily be a relevant part of any factual matrix for any Judge considering the question of a mandatory order, even on the timetable being put forward by the Claimant. I am satisfied that it has proved possible, with a bit of give-and-take, and with good sense on both sides, to identify a detailed sequence of steps within a timeframe culminating in a rolled-up hearing. I have directed that such a hearing will take place on the two days 18 and 19 August 2021. The order I make today sets out my detailed directions and is a publicly available document.

Permission for expert evidence

5. I am also today grasping the nettle and granting permission for the Claimant to adduce the report and addendum report of Dr Sinha (Consultant Respiratory Paediatrician) pursuant to CPR 35.4. I had ventilated, by way of one of my observations, the prospect of that material being before the Court at the rolled-up hearing on a 'de bene esse' basis. It would have been before the Court on that very basis had I directed the one day interim relief hearing that was sought by the Claimant. The Claimant has sought permission for expert evidence at the earliest opportunity (ACO Judicial Review Guide 2020 §20.2.4). I am satisfied that the report and the addendum report are reasonably required to resolve the issues in these proceedings (§§20.2.1, 20.2.2). It will be open to the Defendant, both to adduce expert evidence in reply – for which I have also given permission – or to take any points of substance in response to Dr Sinha's report and addendum report. In a case which is about ongoing consideration, and what is said to be a breach of a statutory duty, where the key remedy being sought is a mandatory order – and where the Defendant itself is commending to the Court the appropriateness of it having considered on an up-to-date basis further information which has yet to be provided by the Interested Party – it is, in my judgment, of particular relevance that in this case the expert's report of Dr Sinha was provided to the Defendant public authority by the Claimant. It would not be just, in my judgment, to 'shut out' that evidence. Indeed, that evidence – having been put before the decision-maker – is part of the factual narrative for the case. Nor does Ms Lean submit that the Court should 'shut out' that evidence. Her preferred position, in line with observations that I had made, was that that report could simply be before the Court (de bene esse) and could be ruled on at the substantive hearing. But Mr Wise has persuaded me that it is far better than everybody knows where they stand and that I deal with this matter today, as I just have.

Oral evidence?

6. One possibility, sometimes ventilated in a human rights case, is that it may prove appropriate to hear from an expert – or more than one expert – giving oral evidence with cross-examination, if there are contested issues as to which there is a necessity in the interests of justice for doing so, having regard to the nature of the issues in the case. The order I make today deals with that prospect by requiring the parties to liaise and identify a point of time within the two-day in-person hearing where it will be possible for the parties, the Court and any person wishing to observe the public hearing to 'switch' to a 'remote hearing' by Microsoft Teams, at which the expert or experts can appear from their locations and can be cross-examined, should the Court have ruled that

such a course is appropriate. That solves the problem. It also avoids the prospect of Dr Sinha having to travel from Liverpool to London for the hearing, because of the prospect that it may be appropriate for oral evidence to be heard. I say nothing about whether it will prove to be appropriate to hear any oral evidence in this case. What is appropriate, at this stage, is to have made the arrangements that I have just described.

The Interested Party

7. Finally, this is a case which clearly directly concerns the Interested Party. The remedy being sought by judicial review would require of the Defendant the taking of positive action: to curtail activities at the Interested Party's landfill or to require or take positive steps in relation to the landfill and what is present on site there. The Interested Party is fully protected by the rules and practices which apply to a judicial review case. I am satisfied that the Interested Party has been notified throughout, in relation to every stage of these judicial review proceedings: starting from the very first letter before claim written on 17 June 2021, including the subsequent letter of 5 July 2021 and service with the court documents when they were filed on 15 July 2021, together with an unanswered invitation to attend today's remote hearing. The directions which I have made have had close regard to the interests of the Interested Party, to secure a fair opportunity for it to participate in these proceedings and provide materials and submissions, should it wish to do so.

23.7.21